United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1159

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Index No. 75 Cr. 956 (CMM)

UNITED STATES OF AMERICA,
Plaintiff,

—*v*—

EDWIN MENDLINGER, STANLEY SCHILDINGER, a/k/a Stanley Snyder, STUART SCHIFFMAN, BARRETT KOBRIN AND BERNARD GRINDLINGER,
Defendants.

ON APPEAL FROM UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT

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INDEX NO. 75 Cr. 956 (CMM)

BRIEF FOR DEFENDANT-APPELLANT STANLEY SCHILDINGER,
a/k/a Stanley Snyder

This is an appeal by defendant-appellant Stanley Schildinger a/k/a Stanley Snyder (hereinafter "Snyder") from a denial by the Southern District of New York, the Honorable Judge Charles M. Metzner presiding of motions for: 1) Dismissal of the Indictment (A93-A97) and 2) Acquittal Notwithstanding the Verdict

(A78-A90) . Snyder was convicted by a jury of counts 1 and 12 of an 18 count indictment handed down on October 1, 1975[2] (A27-A41), judgment entered on April 23, 1976. Counts 2-11 had been stricken prior to jury deliberation. The jury found Snyder, Mendlinger and Kobrin guilty, under count 12, of using deceptive and manipulative devices, which, through the means and instrumentalities of interstate commerce, acted as a fraud upon purchasers of Belair common stock, and, under count 1, of conspiracy to commit the above enumerated offenses (15 U.S.C. 77g; 15 U.S.C. 78j(b); 15 U.S.C 78 ff; 17 C.F.R. 240, 10b-5 U.S.C. 1341).

STATEMENT OF FACTS

Snyder and Mendlinger were the sole and equal shareholders of a brokerage firm known as Mendlinger, Snyder, Inc. (hereafter "M/S"). M/S was formed in January, 1970 when Mendlinger and Snyder bought out the interests of the other shareholders of First Consolidated Securities, Inc., a company they had helped to form in November, 1969.

Belair was formed to implement a unique concept in

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[1] All pages in parentheses refer to pages in the Record on Appeal.

[2] Defendants Barrett Kobrin (hereinafter "Kobrin") and Edwin Mendlinger (hereinafter "Mendlinger") were also convicted on various counts not relevant to this appeal. Defendant Bernard Grindlinger was acquitted on all counts.

attempting to reduce the expenses a doctor would incur in providing laboratory services for his patients. The concept was developed in California by certain businessmen with the strong support of many doctors (A103). Mendlinger and Snyder had nothing to do with the development of the initial concept of the formation of the private corporation which preceded Belair, the public company (A162).

M/S entered the scene when the officers of the predecessor private corporation (also known as Belair Financial Corporation) decided that the organization should be structured as a public company. (A157). In this regard, M/S's services were employed to find a shell corporation with which the private corporation could merge, thus effectively "going public" (A104-A105). Mendlinger and Snyder had in the past arranged such deals involving California companies (A151).

After some investigation, a prime candidate, known as Transition Systems, Inc., was discovered during or about May, 1970. (A105). A merger was arranged and effected by November, 1970 (A106). M/S's compensation included options to purchase Belair stock. (A107-A108). These options were never exercised. M/S was very optimistic about the growth possibilities of Belair

because of the unique concept it offered in the area of professional services. It became the market maker in the stock (A101-A102).

At this point, Mendlinger and Snyder's inexperience in the retail end of the securities business became an obvious obstacle and they sought outside assistance (A109). Early in 1970, they had been introduced to PERRY SCHEER (hereinafter "Scheer"), an unindicted co-conspirator herein, who was not as yet associated with KELLY ANDREWS & BRADLEY (hereinafter "Kelly, Andrews"), also an unindicted co-conspirator. When they first met, Scheer, Mendlinger and Snyder discussed some merger possibilities, but no agreements were reached. Later in 1970, Mendlinger and Snyder contacted Scheer, who was now with Kelly, Andrews, and whom they felt could help improve the retail end of M/S's operation (A109).

Scheer arranged for Mendlinger and Snyder to meet Kelly, Andrew's President, STUART SCHIFFMAN (hereinafter "Schiffman") (A117). (Schiffman, also a defendant in this case, plead guilty before the trial began). Mendlinger and Snyder exhibited the Belair proxy statement which had been prepared in conjunction with the merger described above. Schiffman was interested, and, along with Snyder, flew to California to inspect Belair's operation (A112). Schiffman's inspection apparently whetted his

enthusiasm for the stock, because, upon his return to New York, he indicated he would recommend the stock to his retail customers and his friends in the brokerage business. Schiffman indicated that he expected Kelly, Andrews to be compensated for its efforts, and Mendlinger and Snyder agreed.

Almost immediately, the trading in Belair stock became very active and Mendlinger and Snyder's only reasonable conclusion was that Kelly, Andrews' efforts had created additional markets. Mendlinger and Snyder earned substantial sums during this period through commissions received by trading as the market maker of Belair stock and because the increased price of the stock increased the value of the Belair options and actual stock held by M/S. Belair's success died off when a private offering which it contemplated failed to receive any significant support. Schiffman and Scheer then approached M/S with the idea of selling off 40,000 shares of Belair, 20,000 shares each to two separate brokerage houses. Unknown to M/S, Schiffman and Scheer had reached an agreement with one Akihoshi Yamada, a mutual fund manager for Competetive Associates, that he (Yamada) would in turn buy the shares from the brokerage house. Also unbeknownst to M/S,

Schiffman and Scheer had promised Yamada a $60,000 kickback on the proceeds of the sale in order to persuade Yamada to buy the stock (A158-A161).

After the sale, Mendlinger, Snyder, Schiffman and Scheer entered into negotiations to determine the amount of compensation to be given to Kelly, Andrews for its service as market maker. After some dickering, M/S agreed to pay Kelly, Andrews $125,000 for its services. Earlier, M/S had discharged an $8,000 debt owed by Kelly, Andrews to one Bernard Grindlinger by forwarding a check to Grindlinger through an attorney, Mr. Lewis Markowitz (A116). The discharge of that debt was partial compensation for Kelly, Andrews service.

Schiffman had originally requested that the $125,000 be paid in cash, but Mendlinger and Snyder did not consent (A113). Thereafter, Schiffman requested Mendlinger and Snyder to pay the $125,000 to certain designated parties. A check for $25,000 was issued to Martin Messinger (A122-A123). Schiffman also directed that M/S purchase a total of $100,000 in advertising from various religious organizations named by Schiffman (A118-A121) (A124-A133). M/S acceded to that request and purchased, and was billed for, the advertising.

M/S, through their own auspices, sold their remaining

interest in Belair to Redstone Securities. The trial judge found as a matter of law, that this was a legitimate sale and was not a result of any of the alleged illegal acts or conspiracies (A165-A166).

After the sale to Yamada a meeting was held at Kobrin's house to discuss whether any manipulations of Belair stock were then possible (A134- A150). Neither Mendlinger nor Snyder attended that meeting, nor were they involved in any possible conspiracy arising therefrom (A163-A164).

The investigation of these events by the Government spanned several years. In the early stages, Snyder believing, as he does now, that he had not committed any crimes, gave his full cooperation to the investigating authorities. In March or April of 1972, Snyder was subpoenaed and did appear at the office of the United States Attorney (before Assistant United States Attorney Sullivan). In May, 1972, he was subpoenaed and did appear before a United States Grand Jury. On both occasions, Snyder testified openly, without invoking his Fifth Amendment privileges. Snyder never believed he had committed any criminal acts and he certainly had never intended to commit any criminal act.

QUESTIONS PRESENTED

1. Whether the Government carried its burden of proof as to all elements of the crimes charged so that no reasonable

juror could but find beyond a reasonable doubt that Snyder participated in a conspiracy to fraudulently manipulate the price of Belair common stock?

2. Whether the District Court failed to properly marshal the evidence offered by the Government against all defendants as to the existence of three (3) separate conspiracies?

SUMMARY OF ARGUMENT

Defendant-Appellant Snyder's motions for dismissal and for acquittal notwithstanding the verdict should have been granted as to both count 1 (hereinafter "conspiracy count") and count 12 (hereinafter "substantive count") of the indictment because the Government failed to prove beyond a reasonable doubt that Snyder wilfully intended to manipulate the price of Belair common stock. The defendant-appellant's motions should have been granted as to the conspiracy count because the Government failed to prove beyond a reasonable doubt that there was an agreement to conspire to manipulate the price of Belair common stock.

Defendant-Appellant Snyder's motions should be granted because the trial Court's failure to marshall the evidence as to separate conspiracies (evidence as to a

conspiracy in which the defendant-appellant had no part was wrongfully admitted against him), was prejudicial to the defendant-appellant.

POINT I

DEFENDANT-APPELLANT SNYDER'S MOTIONS FOR DISMISSAL AND FOR ACQUITTAL NOTWITHSTANDING THE VERDICT SHOULD HAVE BEEN GRANTED BECAUSE THE GOVERNMENT FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT-APPELLANT WILFULLY MANIPULATED OR CONSPIRED TO SO MANIPULATE THE PRICE OF BELAIR COMMON STOCK

In order for a criminal case to go to a jury, the prosecutor must show that no reasonable man could have a reasonable doubt as to guilt. U. S. v. Taylor, 464 F.2d 240 (2nd Cir. 1 . "The judge should direct a verdict for the accused if the judge reasonably thinks that a reasonable jury could not find guilt proved beyond a reasonable doubt". U.S. v. Melillo, 275 F. Supp. 314, 317 (E.D.N.Y. 1967).

A. THE DEFENDANT-APPELLANT'S MOTIONS SHOULD HAVE BEEN GRANTED AS TO BOTH THE SUBSTANTIVE AND CONSPIRACY COUNTS BECAUSE THE GOVERNMENT FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT DEFENDANT-APPELLANT SNYDER HAD A WILFUL INTENT TO DEFRAUD

1. The Government must prove wilfullness as to both the conspiracy and substantive counts.

Once the conspiracy is established beyond a reasonable doubt[3] from all the credible evidence, it must be determined whether

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[3] See Section I(B) infra.

the defendant "unlawfully, knowingly and wilfully entered into it." U. S. v. Gisehaltz, 278 F. Supp. 434, 437 (S.D.N.Y. 1967). A defendant cannot be convicted unless he knew what the unlawful purpose of the conspiracy was and unless he entered into the conspiracy with a specific criminal intent -- purposely intending to violate the law. U. S. v. Tortorello, 480 F. 2d 764 (2nd Cir. 1973).

As to the substantive count, it is well established that no fraud conviction may be had if the Government fails to show specific intent. This is true as to cases -- such as this one -- arising from alleged violations of §10(b) of the Securities Act of 1934 (15 U.S.C. 78j(b)) and SEC Rule 10b-5 (17 C.F.R. 240. 10b-5). Ernst and Ernst v. Hochfelder _____U. S. _____, 47 L.Ed. 2d 668 (1976)[4].

2. The Government did not prove wilfullness of defendant-appellant Snyder beyond a reasonable doubt.

Wilfullness generally conotes a voluntary intentional

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[4] Even though Hochfelder, supra, is a civil case, certainly if scienter is required in civil cases, it is required in criminal cases where the burden of proof is stricter.

violation of a known legal duty. U. S. v. Bishop, 412 U. S. 346 (1973). The intentional violations are usually proven through inferences arising from acts of bad faith. U. S. v. Bishop, id. Here, the weight of the evidence indicates that Snyder acted only in good faith, and, at the very least, that no reasonable juror could be convinced of bad faith beyond a reasonable doubt. See U. S. v. Mellido, supra.

The behavior of M/S in its relationship with Belair indicates only good faith. Gary Aminoff, President of Belair, testified that M/S worked hard for Belair (A185-A186). At no point in any of its releases did M/S deceptively represent Belair (A174). Snyder even made the suggestion that Belair voluntarily file a form 10-K with the Securities and Exchange Commission (A283-A284). This filing opened Belair to SEC investigation. Certainly, if Snyder were involved in stock manipulation he would not suggest that Belair invite SEC inquiries.

M/S's Belair common stock trading activity also indicates nothing but good faith. M/S did not exercise the options for purchase of common stock (at $1.20 per share) which they received as compensation for their efforts on behalf of Belair (A175). If M/S were involved in a manipulative scheme they would have exercised that option, for to so exercise

would have given M/S control over a larger percentage of the floating (i.e. -- freely traded stock), thereby making for better control over prices. It would also have given M/S more stock on which to make the allegedly assured profits. Furthermore, M/S sold stock belonging to members of their own family while the price of Belair was still very low (A276-A283). Why would they sell that stock if they planned to manipulate the price upward? M/S bought 40,000 shares of Belair in June from a Joseph Barlow at $2.50 per share after the sale of stock to Yamada (A237). If M/S intended to manipulate the price of Belair up, and then let it die, why did they purchase stock after the alleged "blow-off"?

While it is true that M/S was very active in trading of Belair stock, that activity was required by M/S's role as market maker (A168-A169). Even so, M/S confirmation slips voluntarily advised buyers of Belair common stock of M/S's large position in the stock.

Nor should M/S's suspicions have been aroused by additional interest generated in Belair after Kelly, Andrews was brought in because Kelly, Andrews was hired specifically to create additional markets (A191). The money given to Kelly,

Andrews was compensation for their market making activities (A254). Before Kelly, Andrews entered the market Belair stock had already risen from 5/8th bid, 1 asked, to 5-3/4 bid, 6-3/4 asked (A236). There was ample reason for the price rise. The concept of the corporation was interesting and exciting (A170-A173). Even after the price of the stock had fallen, Redstone Securities, Inc., via independent analysis, determined to buy Belair shares because of the exciting nature of the company (A243,A244-A245). The financial situation of the company improved dramatically during the period in which the price of the stock rose. The number of member doctors increased from 14 to 20 (A187-A188). The company went from a $.03 per share loss to an $.18 per share gain and from a $36,725 loss to a $70,273 profit before taxes and a $44,173 profit after taxes in that time period (A176-A177). Additionally, the corporation name was changed from the bankrupt shell Transition Systems, Inc. to Belair in February, 1971 (A178-A179). Belair hired a public relations firm to stimulate interest in the corporation. Articles about Belair began appearing in newspapers nationwide (A180-A183).

There is also ample explanation for the decline of the price of Belair stock. The market became aware of Belair's financial troubles and its unsuccessful search for additional financing through a private placement of additional shares of Belair (A184).

Conversely, the evidence that Snyder was involved in a manipulative scheme is very flimsy. Perry Scheer, one of only two Government witnesses to connect Snyder to the conspiracy, could recall only the agreement to hire Kelly, Andrews as a market maker, but could not recall any discussion about stock manipulation or kickbacks. (A259-A274). Scheer further testified that Snyder was not present at the meeting at Kobrin's house (after the sale to Yamada), where Schiffman, Scheer, Kobrin and others discussed plans to manipulate Belair. In fact, Schiffman and Scheer were worried that M/S would spoil further manipulation plans because at that time M/S still held a large position in Belair and they (Schiffman and Scheer) were worried that M/S would not cooperate (A246-A253). Why would Schiffman and Scheer worry about non-cooperation if M/S had been involved in the conspiracy from the beginning? Schiffman and Scheer, the only Government witnesses to testify to Snyder's wilfull participation

in the conspiracy, both had participated in numerous other criminal stock manipulation schemes, and are now cooperating with the Government in return for leniency (A192-A235); (A255-A258).

The physical evidence contradicts Schiffman and Scheer's claim that Snyder wilfully participated in a conspiracy to manipulate Belair stock prices. In order to so manipulate, a broker-dealer must control the float of the stock (i.e. -- own enough of the freely traded stock to control prices). In order to control the float, the broker-dealer must own about 90% of the freely traded shares. M/S owned and controlled only 51,600 out of approximately 200,000 freely traded shares. Furthermore, there were other broker-dealers (Icahn and J. D. Winer) trading Belair (A189-A190). The president of Icahn testified that Icahn operated independently. There was no agreement that M/S would supply stock for Icahn. Icahn frequently raised or lowered Belair stock prices at their (Icahn's) own initiative (A238-A242). M/S could not control the other broker-dealers. Even Scheer admits that Snyder did not control the float of Belair common stock (A270-A271).[5]

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[5] Even should a wilfull violation be found beyond a reasonable doubt, that M/S did not control the float should in and of itself be grounds for dismissal. Even though a scheme to defraud

In sum, no reasonable juror could but have a reasonable doubt that defendant-appellant Snyder had the requisite wilfullintent to conspire to engage in a manipulation of the price of Belair common stock.

The Court has the right and the obligation to reverse a conviction where it finds that the prosecution has failed to produce sufficient evidence beyond a reasonable doubt to show that the defendant acted wilfully, or further, that the defendants had guilty knowledge of an alleged conspiracy to manipulate, even if such a conspiracy existed. In United States v. Natelli, 527 F.2d 311 (2d Cir. 1975) the Court reversed the conviction of a co-defendant for wilfully making false and misleading material specifications in a proxy statement where the Appellate Court found there was insufficient evidence with respect to one of the specifications submitted to the jury. In United States v. Tavoularis, 515 F.2d 1070 (2d Cir. 1975), the Court reaffirmed the rule that guilty knowledge may not be imputed from one member of a conspiracy to another or from a principal to an

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in the sale of securities may have been devised, if a sale of these same securities would be legal absent the employment of the scheme and if sales to those investors in which fraud is charged is not tainted by the employment of the scheme, no offense has been proved. U. S. v. Schaefer, 299 F.2d 625 (7th Cir. 1962).

aider and abettor. "Where a substantive defense requires specific knowledge, that same knowledge must be established before a defendant can be found to be a member of a conspiracy to commit the offense". If there is "insufficient evidence of knowledge on the substantive account, the conviction of the conspiracy count is equally defective."

B. THE DEFENDANT-APPELLANT SNYDER'S MOTIONS SHOULD HAVE BEEN GRANTED AS TO THE CONSPIRACY COUNT BECAUSE THE GOVERNMENT FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THERE WAS AN AGREEMENT TO CONSPIRE.

The Government must prove beyond a reasonable doubt that there was an agreement entered into by Snyder with Schiffman and/or Scheer and/or Kelly, Andrews. See United States v. Gisehaltz, supra. The gist of the offense of conspiracy remains the agreement. United States v. Borelli, 336 F.2d 376 (2nd Cir. 1964). If there was no agreement, there can be no conspiracy.

Evidence as to the alleged agreement was contradictory. Schiffman claimed that the agreement was that M/S and Kelly, Andrews were to evenly divide all proceeds on sales of Belair made by M/S at prices above $3.00 per share (A286). Scheer indicated at various times that the price above which proceeds

would be split was $2.50 per share (A280-290); $4.50 per share (A291-A293); $5.00 per share (A294) and $5.50 per share (A294). Furthermore, Scheer indicated that the demarcation point was raised during the course of negotiations (A288). Schiffman never mentioned any such raise. These inconsistencies can only prove that there was no agreement, because an agreement can exist only where there are mutual promises.

Even if it could be believed beyond a reasonable doubt that despite the contradictions in Schiffman and Scheer's testimony, there was an agreement, the type of agreement that was outlined is so incredible under the circumstances that no reasonable juror could believe beyond a reasonable doubt that the agreement existed.

If M/S provided all the consideration for the stock when it was purchased, and if the stock was purchased at a price above the point at which proceeds from the same would be split, then M/S would actually lose money if they had to give Schiffman and Scheer half the consideration received upon selling the stock.

If, for example, the stock was purchased from the original Transition Systems stockholders from anywhere from $.75

to $1, $1-1/2 a share, the alleged agreement might make some sense, because then there would be a profit built in for M/S below the $3 item and above the $3 supposed dividing line.

But testimony showed that by the time the alleged conspiracy started, Belair stock had already risen to 5-3/4 bid, 6-3/4 asked, and some purchases were made as high as $14 per share (A287). These prices are higher than any of the demarcation points indicated by Schiffman and Scheer.

If, then, the alleged agreement was as Schiffman and Scheer testified, Snyder was a victim of the conspiracy rather than a member of it.

POINT II

DEFENDANT-APPELLANT SNYDER'S MOTION FOR ACQUITTAL NOTWITHSTANDING THE VERDICT SHOULD HAVE BEEN GRANTED BECAUSE THE COURT FAILED TO PROPERLY MARSHAL EVIDENCE OF THREE SEPARATE CONSPIRACIES OFFERED BY THE GOVERNMENT.

The Government has offered proof of the existence of three (3) separate conspiracies which the Court failed to properly marshal. The three (3) alleged conspiracies were: 1) a purported conspiracy involving M/S, Schiffman, Scheer and Kelly, Andrews - to manipulate the price of Belair common stock which terminated at the end of April, 1971 with the alleged "blowing off" of 40,000 shares of Belair Financial stock

which was eventually bought by the mutual fund controlled by Yamada; 2) the Redstone conspiracy (about which the Court properly instructed the jury to disregard all testimony relating to the sale of Belair Financial stock to Redstone Securities); 3) a conspiracy initiated in June, 1971 between Schiffman, Scheer, Kobrin, Hager and other named and unnamed brokers which is completely separate and distinct from either of the aforementioned conspiracies. The most significant overt act made in pursuance of the third conspiracy was a meeting at Kobrin's parents' home in June of 1971, which Snyder did not attend. The conspiracy planned to acquire enough Belair Financial stock to control the float and then to manipulate the price upward. Kobrin was promised payment of $1.00 or $1.50 for each share he sold to his customers. However, Snyder did not participate in this third conspiracy. In fact, at this time, the conspirators believed that M/S possessed sufficient amounts of Belair Financial stock "over-hanging" the market (A315). which, if purchased by the conspirators, would effectively allow them to control the float of the stock. However, as Scheer learned when he telephoned Snyder to try to arrange a purchase of this block of stock, it had already been sold to Redstone Securities. The members of the third conspiracy hoped that by buying the M/S stock, they

could withhold it from the market, push the price up and then blow if off. (A296-A315).

Although the alleged plot of the third conspiracy mirrored that of the alleged first conspiracy, the conspiracies were separate and distinct. While it is true that there were some members common to both conspiracies, this type of nexus has never been held sufficient in and of itself to support a finding of one conspiracy. United States v. Bertolotti _____ F.2d_____(2nd Cir. 1975).

Nor is there a sufficient nexus to connect Snyder to the third conspiracy. He did not attend the meeting at Kobrin's house. He did not even know that it was taking place

cf. United States v. Sperling, 506 F.2d 1323 (2nd Cir.) cert. den. 420 U.S. 962, 421 U.S. 949 (1974).

Where the Government alleges one overall conspiracy and then proceeds to prove two or more separate conspiracies, the appellate courts will reverse a conviction. United States v. Sperling, supra. Dismissal is required because of the variance between the proof adduced at trial and the charges of the indictment. United States v. Tramunti, 513 F.2d 1087 (2nd Cir. 1975). Nevertheless, the Court here charged that evidence as to all alleged conspiracies, except that concerning Redstone,

could be admitted as against all defendants. (A316-A370). It can hardly be said that the evidence admitted to prove the third conspiracy could not have influenced the jury in making its determination as to the conspiracy which was charged in the indictment. See United States v. Miley, 513 F.2d 1191 (2nd Cir. 1975).

CONCLUSION

WHEREFORE, defendant-appellant Snyder respectfully requests this Court to reverse the judgment of the District Court, dismiss the Indictment herein and grant such other and further relief as this Court may deem just and proper.

RESPECTFULLY SUBMITTED,

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